



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CONSTITUTIONAL PETITION No. 26 of 2017

IN THE MATTER OF IN THE MATTER OF ARTICLES 2, 3, 10, 22, 73, 129 AND 201 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF SECTIONS 102, 113, 118, 131, 133, 135, 147, 196, 197, 203 AND 207 OF PUBLIC FINANCE MANAGEMENT ACT NO. 18 OF 2012

AND

IN THE MATTER OF SECTION 31 AND 66 OF THE COUNTY GOVERNMENT ACT

AND

IN THE MATTER OF KISUMU COUNTY TASK FORCES

BETWEEN

COLLINS OTIENO NDIEGGE.....PETITIONER

VERSUS

THE GOVERNOR, KISUMU COUNTY,

PROF. PETER ANYANG NYONGO.....1ST RESPONDENT

AG. COUNTY SECRETARY, KISUMU COUNTY,

DR. CHARLES OLANG'O ONUDI.....2ND RESPONDENT

JUDGMENT

### Background

1. Petitioner is a resident of Kisumu County while the respondents are the Governor and Acting County Secretary of Kisumu County. The petition dated 20th November, 2017 was filed together with a notice of motion of the same date. The 2nd respondent filed a replying affidavit sworn on 27th November, 2017 which was agreed to be deemed as the answer to the petition and the notice of motion. The petitioner seeks the following orders:

**1. A declaration that the formation of the task forces by the respondents by dint of the internal memo dated 31st August, 2017 from the 1st respondent to the 2nd respondent or any instrument of like nature violates the provisions of Article 2, 3, 10, 22, 23,(2), 73, 129 and 201 of the Constitution and Sections 102, 113, 118, 131, 133, 135, 147, 196, 203, and 207 of the Public Finance Management Act and Section 31 and 66 of the County Government Act and the said task forces are null and void**

**2. Cost of the petition be awarded to the petitioner**

2. The genesis of this petition is that by a memo dated 31st August, 2017, 1st respondent appointed the following task forces:

- a. Human Resources
- b. Environment and Infrastructure
- c. Revenue Collection
- d. Village Councils
- e. Pending Bills
- f. Health Services and Health Delivery Systems

g. Coordination Committee

3. That together with the taskforces, 1st respondent also appointed coordination committees for each taskforce, each with 7 members and requested the 2nd respondent to prepare appointment letters for the taskforces to work from 1st September, 2017 to 30th September, 2017.

**Applicant/Petitioners' Case**

4. The petitioner's grievances are set out in the petition as follows:

- i. The 1st respondent has no single term of reference for the task forces and does not know what they are set to do and achieve
- ii. The respondents do not know how much public money the task forces will present as their budget and whether that money is available
- iii. Only the respondents know the credentials of the members appointed to the task forces
- iv. The budget for the taskforces was not factored in the 2016/2017 finance Bill and the same was not gazetted
- v. The appointment of the taskforces breaches the provisions of the Constitution, the Public Finance and Management Act and the County Governments Act
- vi. There was no public participation in the appointment of members of the task forces

**Respondents' case**

5. The respondent's response is contained in an affidavit sworn by the 2nd respondent on 27th November, 2017. Respondents state that respondents acted within the provisions of Section 30(2) and 31(d) of the County Government Act and further that members of the task forces are not public officers under the Constitution and the County Government Act but are part of the formulation of policies and structures to ascertain the financial debt, human resource, environment and health, and legislative components to ensure that data inherited conforms to the law and best practices.

6. It is the respondents' case that the task forces have virtually completed their work and that the petition has therefore been overtaken by events.

**THE LAW**

7. The principles for consideration of application for conservatory orders in constitutional litigation are as follows:

***a. Arguability of the applicant's case. Sometimes a prima facie with 'probability' or 'likelihood of success' case is sought but in my view it is an arguable case that is relevant because at the interlocutory stage, the court does not attempt a final determination of the dispute and the arguable case does not mean a case that must succeed.***

***b. Prejudice of the applicant.***

***c. Public Interest.***

8. In Nairobi Constitutional Petition No. 206 of 2016 ***Satinderjit Singh Matharu v. Armajit Singh Gahir & 5 Others*** the court said that:

***"Despite varied nomenclatural expressions, the principles upon which the High Court considers application for conservatory orders in constitutional litigation are now settled by several decisions on the point, and may be condensed as follows:-***

***1. The applicant must demonstrate prima facie case, or an arguable case, for the grant of the relief sought.***

2. *The applicant must stand to suffer an irreparable harm, injury or loss not remediable by any other relief; and*

3. *As a remedy in constitutional litigation, the conservatory order calls for consideration of the public interest in the matter, and the balance of convenience between the petitioner's and the respondent's case must favour the grant of the conservatory order."*

9. Similar considerations were put forth by the Courts in Republic v. County Public Board & Anor. ex. p. Hulbai Gedi Abdille (2015) eKLR (per Odunga, J.), John Mining Temol & Anor. v. Governor of Bungoma County & 17 Ors. (2014) eKLR (Mabeya, J.), Sammy Ndungu & 5 Ors. v. Governor, Laikipia County (2016) eKLR (per Ngaah, J.), Gatirau Peter Munya v. Dickson Mwendwa Kithinji & 2 Ors. (2014) eKLR (Supreme Court) and Wanjiru Gikonyo & 2 Ors. v. National Assembly of Kenya & 3 Ors (2016) eKLR (per Onguto, J.) and Andrew Omtatah Okoiti v. AG & 2 Ors (2011) eKLR (per Musinga, J. as he then was).

10. It is also trite that an applicant who approaches the constitutional court for redress of violations of the Constitution must with specificity state the particulars of the constitutional provisions alleged to be violated and the manner of the violation.

### **Analysis and Determination**

11. The petitioner contended that Articles 2, 3, 10, 22, 73, 129 and 201 of the Constitution Of Kenya, 2010 and Sections 102, 113, 118, 131, 133, 135, 147, 196, 197, 203 and 207 of Public Finance Management Act No. 18 Of 2012 as the provisions of the constitution have been infringed and being threatened with further infringement and alleged a contravention of section and sections 31 and 66 of the County Government Act, 2012.

12. Section 30 of the County Government Act provides as follows: The Governor—

*(a) may, despite section 40, dismiss a county executive committee member at anytime, if the governor considers that it is appropriate or necessary to do so;*

*(b) shall dismiss a county executive committee member, if required to do so by a resolution of the county assembly as provided under section 40;*

*(c) may appoint an accounting officer for each department, entity or decentralized unit of the county government; and*

*(d) shall have such powers as may be necessary for the execution of the duties of the office of governor.*

13. On the other hand Section 40 deals with removal of members of the executive committee.

14. Although the foregoing sections appear inappropriate to the dispute herein, Article 260 of the Constitution defines a public officer to mean-

*(a) any State officer; or*

*(b) any person, other than a State Officer, who holds a public office*

Public office is defined under the same Article to mean an office in the national government, a county government or the public service, if the remuneration and benefits of the office are payable directly from the Consolidated Fund or directly out of money provided by Parliament.

15. From the foregoing, there is no doubt that members of the task forces were going to be paid or were paid directly out of money provided by Parliament and are therefore public officers whose positions are required to be filled not by appointment by the Governor but by competitive recruitment by County Public Service Board under Section 66 which provides as follows:

***"If a public office is to be filled, the County Public Service Board shall invite applications through advertisement and other modes of communication so as to reach as wide a population of potential applicants as possible and especially persons who for any reason have been or may be disadvantaged."***

16. Section 102 of the Public Finance Management Act provides that each county government shall ensure adherence to the principles of public finance set out in Chapter Twelve of the Constitution. Section 118 of the said Act requires a County Treasury to prepare a County Budget Review and Outlook Paper in respect of the county for each financial year. Section 131 provides that the county assembly shall consider the county government budget estimates with a view to approving them, with or without amendments, in time for the relevant appropriation and any other laws required to implement the budget to be passed by the 30th June in each year while Section 147 mandates the accounting officer of a county assembly to promote and enforce transparency, effective management and accountability with regard to the use of public finances.

17. It is the respondents' case that the task forces have virtually completed their work and that the petition has therefore been overtaken by events. It is indeed true that this petition was filed on 21st November, 2017 which was 9 days to the expiry of the life of the task forces in question.

18. As was rightly stated in Republic vs. Returning Officer of Kamkunji Constituency & The Electoral Commission of Kenya HCMCA No. 13 of 2008, it is the responsibility of the Court to uphold the rule of law and to ensure that executive action, that Parliament intended, is exercised.

19. Section 65 (1) of the County Government Act requires that the County **Public Service Board** in selecting candidates for appointment regard be had of –

**“(f) the need for open and transparent recruitment of public servants.”**

The appointment of the members of the task force was not by the County **Public Service Board and it was neither open nor transparent. There is also no evidence that their** remuneration and benefits had been budgeted for and approved.

20. The life of the task forces in question has lapsed. However, this turn of events does not bar the court from making a determination on the issues at hand.

21. In purporting to appoint the members of the task forces, the respondents no doubt breached the Constitution and the Law among them Article 10 on good governance, integrity, transparency and accountability; Article 73 which obliges that responsibilities of leadership be exercised in a manner consistent to the Constitution; Article 201 which commends that public money shall be used in a prudent and responsible way, Section 30(3)(f) of the County Government Act which obligates the 1st respondent to be accountable for the management and use of the county resources and Section 102 of the Public Finance Management Act which requires each county government to ensure adherence to the principles of public finance set out in Chapter Twelve of the Constitution.

22. I therefore declare that the formation of the task forces by the respondents by dint of the internal memo dated 31st August, 2017 from the 1st respondent to the 2nd respondent violated the provisions of the Constitution, Public Finance Management Act and the County Government Act.

23. I however decline to grant a conservatory order since the life of the task forces has lapsed. I make no order for costs. It is so ordered.

**DATED, DELIVERED AND SIGNED THIS 17th DAY OF May 2018**

**T.W. CHERERE**

**JUDGE**

Delivered in open court in the presence of-

**Court Assistant - Felix**

**For the Applicant/Petitioner - Mr. Nyamweya**

**For the Respondents - N/A**